UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SANDRA J. BERRIOS, Plaintiff,	
-vs-	Case No. 1:11-cv-1130
EXPERIAN INFORMATION SOLUTIONS, INC, et al., Defendants.	

HEARING ON MOTIONS

February 17, 2012

Before: Ivan D. Davis, Mag. Judge

APPEARANCES:

Kristi C. Kelly and Matthew J. Erausquin,
Counsel for the Plaintiff

George E. Kostel, Counsel for Defendant Flagstar

NOTE: The case is called to be heard at 10:52 a.m. as follows:

THE CLERK: Berrios versus Experian Information Solutions, Incorporated, et al., case number 11-cv-1130. Parties please identify yourselves for the record.

MR. KOSTEL: Good morning, Your Honor. George Kostel on behalf of Flagstar Bank.

THE COURT: Good morning.

MS. KELLY: Good morning, Your Honor. Kristi Kelly on behalf of Sandra Berrios.

As a preliminary matter, we have two individuals we would like to move for admission into this court before Your Honor.

MR. ERAUSQUIN: Good morning, Judge. Matthew Erausquin for the plaintiff. I am an attorney licensed to practice before this court. I would like to introduce Janelle Mason, she is an attorney in my office.

THE COURT: We move admissions at the podium.

MR. ERAUSQUIN: I would like to introduce Janelle Mason, she is an attorney in my office, duly licensed to practice in the Commonwealth of Virginia. She is of great moral character, I have known her for many years. We move her admission this morning.

THE COURT: Is there an application?

Ms. Mason's application appears to be in order. The

motion will be granted. Can we provide her the oath of admission.

NOTE: Attorney Mason is sworn.

THE COURT: And who is the second individual?

MS. KELLY: Your Honor, I would like to move Andrew Guzzo into the practice before this Court. He is an associate of Surovell Isaacs Petersen & Levy, he is a graduate of Washington & Lee University, and he clerked for our law firm prior to joining as an associate this year.

THE COURT: Mr. Guzzo's application likewise appears to be in order. Motion is grant. Provide him the oath for admission as well.

NOTE: Attorney Guzzo is sworn.

THE COURT: Ms. Mason and Mr. Guzzo, the Court welcomes you to the Eastern District of Virginia. I am sure your counsel has informed you or your colleagues have informed you, we're more fondly known as the Rocket Docket. Look forward to seeing you in the courtroom.

MS. MASON: Thank you.

MR. GUZZO: Thank you, Your Honor.

MR. KOSTEL: Good morning again, Your Honor. There are two parts to my motion this morning. One is the location of the Flagstar depositions, and the other is whether subpoenas are required as to the low level employees.

I take your admonition very seriously. I have

nothing to add to my papers unless you have questions for me.

THE COURT: Well, the Court does have a question. It appeared based on a reading of the responses to the motions that the plaintiffs were in agreement that these depositions should be taken in Michigan, is that correct?

MR. KOSTEL: That's the way I read it too, Your Honor, and I was just asking for a reissued notice that confirmed that so there wouldn't be any debate down the road when the letters and the e-mail correspondence got mixed in with the notice of deposition. I didn't want them to be able to argue that we had somehow consented to a notice of deposition in Virginia. I just don't think it's proper.

I am entitled to a proper notice. I am entitled to be able to respond to it.

THE COURT: All right.

MR. KOSTEL: The same argument with the subpoenas. I think that is, that is something they do argue, but we can address that after we hear from them.

Thank you, Your Honor.

MS. KELLY: Good morning, Your Honor. I will just briefly address the issue of the location of the depositions.

In Mr. Bennett's e-mail in response to Mr. Kostel's letter we said it would be no problem to take them by telephone. In that same e-mail we asked for dates, since he also objected to the dates of the deposition, so that we could

reissue the notice for dates that were more convenient to him so long as they were within a couple weeks.

We never received a response to that, so we didn't reissue any notices. And two days later he filed this motion for a protective order.

So, we're happy to work with him on dates and issue appropriate deposition notices once we determine dates that are acceptable.

THE COURT: All right. Well, that portion of the motion is granted. Obviously, there is a presumption that those 30(b)(6) motions and things be conducted in the area or in the state or district in which corporate headquarters are located.

So, let's move on to the second part of the motion.

MR. KOSTEL: Part two, Your Honor, is the subpoenas as to the low level employees. Rule 30(b)(1) allows for depositions of officers, directors and managing agents of a corporation. If an employee is not one of those things, a subpoena is required.

The du Pont case issued out of this court recently makes clear that to be a managing agent-- First of all, there is no question they are not officers or directors, we all agree on that. du Pont makes clear that they have to manage someone.

These are customer service representatives. They don't manage anyone. They answer the telephone and respond to

customer inquiries, that's all they do. And there has been no evidence to the contrary proffered by the plaintiffs. So, therefore, we need subpoenas to compel their attendance in Michigan where they reside.

Thank you.

MS. KELLY: It's our position that the 30(b)(1) depositions of the ACDV employees are considered managing agents. An ACDV employee processes the credit dispute which is the subject of this action that Ms. Berrios has filed before the Court. A dispute comes from the credit reporting agencies. The ACDV operator receives the dispute, investigates based on the corporation's policies and procedures using different documents in their possession, and uses their discretion to make a decision as to whether the dispute is proper, whether to verify the dispute, whether to correct the dispute, or whether to update the dispute, and sends that information back to the CRAs, the credit reporting agencies.

And so, for--

THE COURT: They have to exercise their judgment and discretion concerning corporate matters.

MS. KELLY: Right. And their--

THE COURT: Every employee exercises their discretion and judgment in some form or another. A janitor exercises his discretion whether or not he is going to mop the floors at 7 or 7:30. That doesn't make, if he is a janitor for a company,

doesn't make him a managing agent of that company, does it?

MS. KELLY: No, it doesn't, but these employees are exercising discretion in relation to their employer's policies and procedures regarding the credit disputes.

They are also considered party witnesses because the validity of their dispute, the reasonableness of their investigation is the exact issue that's the heart of this litigation. They are considered party witnesses, and this was addressed in the Wilkes matter before Judge Jones recently, and he considered them party witnesses.

They are managing agents. The factors to consider are whether they invested discretion in the exercise of judgment. And they clearly do. They look at the disputes, they refer to database documents in their system, and they use the policies and procedures of their employer to determine whether an investigation should result in changing the information or not.

And this is analogous to the Tomingas case that we cited in our brief. In that case there were two low-level employees who were sent to investigate a crash site. They went to the site to obtain information about particles that were left after the crash of the airplane.

Those employees were determined by the Court to be managing agents even though they weren't an officer or director because they had to determine what was relevant evidence and

what wasn't.

It is analogous to the ACDV operators because they received the disputes from the credit bureaus. They are the only individuals that process them. They don't confer with other employees. They get the dispute and they determine based on their judgment, knowing their employer's policies and procedures, whether it's relevant or not.

And so, we would submit that it's exactly analogous to the Tomingas case. And under the standards in the du Pont case, they exercise discretion, they are required to carry out their employer's instructions, and their interests are clearly aligned with their employer versus Ms. Berrios.

It's doubtful that the defendant would allow us to contact them directly. And it is even more doubtful that the defendant wouldn't defend their depositions.

And for these reasons, we would submit that they're clearly managing agents.

Thank you.

MR. KOSTEL: Just 30 seconds, Your Honor. If that were the standard, then the janitor would be a managing agent if I sued after I slipped on the floor. The janitor would be using his discretion to mop the floor. The question of the exercise of that discretion would be to issue, in my slip and fall case, I wouldn't have to subpoena the janitor, he would automatically be a managing agent.

So, you would have this resolving scope of managing agent authority depending on what the facts in a particular case were. That's not the standard. The standard is it's black and white, you are either a managing agent--

THE COURT: Well, it's never black and white --

MR. KOSTEL: Think about the context of--

THE COURT: Because the Court has to conclude whether or not these individuals have sufficient discretion in exercising their judgment concerning corporate matters. That's a factual determination the Court has to make in every case.

MR. KOSTEL: Certainly. But I'm asking you to look at the context of the rule that says, officers, directors and managing agents. The first two are very readily identifiable.

I think the drafters of the rule intended for managing agent to be in that echelon, not to be the echelon of somebody who is answering the phone doing customer service calls.

Thank you, Your Honor.

THE COURT: Well, the Eastern District has made it quite clear that there are three factors this Court has to consider. And I believe the second and third factors basically apply to any employees.

So, it's really the first factor that is controlling, whether the corporation has invested that person with sufficient discretion to exercise their judgment concerning

corporate matters.

Now, the janitor mopping the floor at 7 or 7:30 isn't exercising his judgment concerning a corporate matter because the mopping the floor isn't a corporate matter.

This case is somewhat different than that because they are exercising their judgment in regards to making a final determination based on company policies, that something should or should not or is or is not disputed. The Court has insufficient information in its possession to conclude that these individuals are managing agents.

However, what the Court is clear about is that there is sufficient case law that says when there is any doubt, that doubt is to be resolved in the fact, in the determination that they are. And that's where the Court at this point in time finds that there may be some doubt and, therefore, or that there is some doubt based on their job description and, therefore, will conclude under these circumstances they may be defined as managing agents.

Now, you said that those were the only two questions concerning the motion, but I thought the motion also dealt with the fact that the 30(b)(6) notice was overly broad.

MR. KOSTEL: I raised that issue, Your Honor, but if they are prepared to renotice the deposition, I would object at that point if the Court wants to consider it later, but I would be happy to address it now also.

THE COURT: All right. Well, you seem as if you wish to say something.

MR. ERAUSQUIN: Just real briefly, Judge.

The concern that we see from the defendant is the number of topics and the way in which we have described the topics. And as we have made clear to them, we've outlined these topics with specificity so as to minimize the number of discovery issues we have in the case, the scope of the deposition, and so that they can adequately prepare their 30(b)(6) representatives.

We have had a meet and confer session with them about these topics, that we believe they are appropriate. These types of depositions have been compelled. We do most of our litigation down in the Richmond division.

For those reasons, we believe that 30(b)(6) notice as issued is appropriate, Judge.

THE COURT: All right. Well, the Court would not conclude that a notice of deposition is overly broad simply because of the number of topics sought to be deposed. It's what those topics are.

Having reviewed the topics, the Court does conclude that there are, in fact there is less than 27 because they are repetitive issues or topics, at least in the Court's opinion.

However, there are some issues that the Court does not believe are relevant. So, we can deal with this matter now

or, based upon that information, the parties can get together and try to narrow the topics.

MR. KOSTEL: Your Honor, if you have reviewed it, we might as well go ahead and get to the topics themselves.

THE COURT: All right. Because the Court finds, number 1 not really even relevant. The history and corporate structure of defendant Flagstar Bank has absolutely nothing to do with whether or not these individuals participated in keeping inaccurate information on the plaintiff's credit report.

Flagstar's knowledge and understanding of Fourth Circuit's explanation, completely irrelevant.

The method, manner and terms of compensation for each Flagstar employee, the Court doesn't find any relevance.

Flagstar's best estimate of the expense and costs of each ACDV investigation, the Court does not find relevant.

Your knowledge of the Bach versus First Union FCRA case, the Court does not find relevant.

The Court is a little confused in regards to 18, 19, 26 and 27, a little-- I don't quite understand what you're asking for, for one. And because it's unclear as to what you're asking for, the Court finds it difficult to determine whether or not it's relevant or not. The Court doesn't understand what an e-Oscar scorecard is, for one.

MR. ERAUSQUIN: Can I address all these when you're

finished, Your Honor?

THE COURT: Okay. So, those are the ones that the Court deems that are completely not relevant.

Number 2, in regards to previous litigation, well, there can be all types of litigation. There could be job discrimination complaints and all of the such.

So, the Court would find number 2 only relevant as to the litigation involving the claims in this particular complaint.

MR. KOSTEL: And then my other objection to that one, Your Honor, was five years, going back five years. Would two years be sufficient?

MR. ERAUSQUIN: Judge Payne has actually ruled on this. He said we should have used three years. His ruling was three years prior--

THE COURT: I was going to say three.

MR. KOSTEL: No objection.

MR. ERAUSQUIN: Three years prior to the acts complained of is--

THE COURT: Well, would plaintiff's counsel like to address issues 18, or topics 18, 19, 26 and 27?

MR. ERAUSQUIN: Well, we would like to start with 5, Judge. 5 goes to the issue of willfulness. That is, whether or not Flagstar's interpretation of the requirements of the Fair Credit Reporting Act pursuant to the Supreme Court's

decision in Safeco and how it obtained that understanding--

THE COURT: What willfulness goes to is whether or not a trier of fact has determined whether or not Flagstar's employees' conduct amounts to willfulness, meets the definition of willfulness.

Their understanding of what that definition is is completely irrelevant. It's the trier of fact-- The judge is going to instruct the jury of what the definition of willfulness means. Then the trier of fact has to determine whether or not the defendants' conduct meets said definition. That's the only thing that is relevant concerning willfulness.

MR. ERAUSQUIN: Well, in the Supreme Court's decision in Safeco the issue was whether or not the individual who is alleged to have violated the Fair Credit Reporting Act had an interpretation of the statute that was reasonable.

And so, our position would be that with respect to-- If Flagstar Bank would say, for example, we never read the Fourth Circuit's decision in the Johnson case-- Which, by about the way, Judge, is the seminal case not just in our circuit but across the country, we would argue that that went to whether or not their interpretation of the statute was reasonable if they never read the case law surrounding it as it applies at least in our circuit.

THE COURT: But an interpretation of an entire statute is one thing. Whether or not the parties' conduct

amounts to willful or reckless behavior is another.

MR. ERAUSQUIN: Yes, sir. But the conduct is driven by the company's policies and procedures, which are created by lawyers who are reading the statute and reading the case law surrounding the statute.

THE COURT: But these employees when they conducted themselves-- There is no information in this Court's possession that when these employees conducted themselves in this manner, that they had been previously advised by their lawyers of what willfulness means.

MR. ERAUSQUIN: Yes, sir. If that becomes an issue, we can revisit that, I guess, Judge.

I was trying to follow the numbers in which you had expressed some concern with the relevance of the topics, and I missed the next few of them. After 5, Your Honor--

THE COURT: That the Court found not relevant?

MR. ERAUSQUIN: That the Court found, right, not relevant.

THE COURT: 13, 16, and 25.

MR. ERAUSQUIN: With regard to actually both 13 and 16, this I think falls into the category of two that have significant overlap. The issue is whether or not Flagstar apportioned the proper resources to its employees to determine whether or not the consumer's dispute had any validity. The issue generally, and we've--

THE COURT: They paid them.

MR. ERAUSQUIN: Correct, Judge, but the issue is how they paid them.

THE COURT: How much they get paid is irrelevant. Your argument would be then that people who get paid less money, do a poor job; and people who get paid a lot of money, do a wonderful job. Based on the Court's experience, we know that's not the case.

MR. ERAUSQUIN: Right. We are not exactly there, Judge. The way that banks, at least most banks, this is our first litigation with Flagstar, set up the process by which ACDV employees get paid is they get paid on quality and they get paid on production. Quality relates to how closely they follow the procedures of the company. Production relates to how many of these disputes they process.

If they process more disputes, they get paid more money, which means that inherently they spend less time per dispute. That's what we were getting to with the way that they incentivize their employees to process a greater amount of disputes per day. If they are flying through these and spending five seconds and saying, verify, verify, verify, without conducting an investigation, that's relevant, Judge.

THE COURT: But then the issue is whether or not they conducted a reasonable investigation.

MR. ERAUSQUIN: Correct.

THE COURT: Not how much time it took to conduct said investigation.

MR. ERAUSQUIN: Well, it--

THE COURT: Simply because an investigation may take an hour by some ACDV employee and the same investigation may take 30 minutes by another ACDV employee, doesn't mean that the employee who took 30 minutes did a bad job, a worse job than the one who took an hour. Some employees are better than other employees.

Just like lawyers, some lawyers take a lot longer to accomplish the exact same task than other lawyers do. That's why they get paid differently.

The Court does not find that information to be relevant.

MR. ERAUSQUIN: 25 actually would fall into the same category as 5, but with, with even more poignance, Judge, because this was a decision that related to this particular defendant.

In other words, there was a Fair Credit Reporting Act decision by which one of the predecessor companies of this defendant was told that its procedures did not comply with the Fair Credit Reporting Act. The jury awarded, I believe it was 4 or $600,000. That prior litigation knowledge, that prior warning would be, would serve as notice to the defendant that it needed to take another look at the procedures that its

employees were using to investigate these disputes.

THE COURT: I thought you said it was the predecessor of this bank?

MR. ERAUSQUIN: Correct.

THE COURT: Not this bank.

MR. ERAUSQUIN: Correct. It was the First Union entity that was the subject of the prior litigation. As I understand it from the depositions that were taken in this case, this entity took over First Union. Therefore, it subsumed that company that was the previous defendant in the earlier litigation.

THE COURT: And were the claims in that litigation substantially identical to the claims in this litigation? And were the allegations about whether or not the defendant properly filed or properly followed certain procedures essentially and substantially identical as the allegations contained in this complaint?

MR. ERAUSQUIN: The only section of the Fair Credit Reporting-- The answer is yes. The only section of the Fair Credit Reporting Act that you can sue on based on a furnisher's conduction of an investigation is Section 1681s-2(b). That was the issue, that was the claim at issue in Bach, and that's the claim at issue in this case, Judge.

THE COURT: No. What I am trying to get to is the, was the factual scenario substantially identical to the one in

this case?

MR. ERAUSQUIN: In Bach I believe it was an individual who was the subject of identity theft, that was an account that was not hers. We had a similar issue in this case with regard to the accuracy of the credit recording.

THE COURT: But it dealt with the accuracy of the credit report and the procedures followed to determine whether or not that information was accurate?

MR. ERAUSQUIN: Yes, sir.

THE COURT: The Court will find 25 relevant.

MR. ERAUSQUIN: With regard to 26, this goes to willfulness. In other words, we're trying to get Flagstar to take a position as to whether or not the actions that its employees taken, took in this case were the result of a mistake, or did they intend for the employees to take the actions that they took.

If they want to concede, essentially, negligence and say, our employees dropped the ball here, we want to know that up front so that we can structure our jury argument accordingly. We are just asking them to take a position as to what happened in this case, Judge.

THE COURT: That clarifies what that means. The Court will find that relevant.

MR. ERAUSQUIN: And, actually, that's explicitly what 27 is saying as well.

THE COURT: It would be the same for 27. What about 18 and 19?

MR. ERAUSQUIN: All right. With regard to 18, the Fourth Circuit, they had a decision in Saunders, it was about two years ago, that related to whether a furnisher's investigation of a consumer dispute could be categorized as reasonable, relates to whether or not that information was accurate and complete.

In other words, when the furnisher responds back to the credit reporting agency--

THE COURT: The case isn't going to assist me in determining relevance without telling me what 18 means.

MR. ERAUSQUIN: Yes, sir.

THE COURT: That would be the Court's problem.

MR. ERAUSQUIN: I am almost there, Judge. I am almost there. One of the components as to whether or not that information is complete is whether or not that information is the subject of an ongoing dispute by the consumer.

Code XB in number 18 means in the credit reporting world, this account is the subject of a dispute. CCC means compliance condition code.

So, we're asking whether or not Flagstar understood that when it reported that the trade line was the subject of an ongoing dispute, that it would no longer be included as part of that consumer's credit score.

THE COURT: That's probably the way you should have phrased the question or the topic.

MR. ERAUSQUIN: Yes, sir.

THE COURT: The Court will find that relevant.

What about number 19?

MR. ERAUSQUIN: The e-Oscar scorecard, this is a month-by-month report as to how the defendant has responded to credit reporting disputes that have come in through the credit reporting agencies.

The evidence we're going to seek is in how many instances where disputes came in you did you just say, verified as reported. Or in how many instances did you say that we need to modify the information or that the account should be deleted, for example, due to fraud.

And so, we're asking as to the defendants' knowledge as to how it has responded to e-Oscar disputes each month.

THE COURT: You mean prior to an investigation?

MR. ERAUSQUIN: Correct. I don't have the timing of every single ACDV that we have in this case, but we have limited it to the period beginning January 1, 2010, to the present.

We would accept a stipulation that it would be the period that began the month before the ACDVs in this case were processed. The ACDVs are the disputes that come from the credit reporting agencies.

THE COURT: No, that really wasn't the Court's question. What the Court is trying to determine is, if something was verified as reported, and it was determined later on that that was an accurate verification, that doesn't appear to help your case at all. It only appears that if they say verified as reported and later on there was a determination that that determination was inaccurate, would that be helpful.

MR. ERAUSQUIN: Correct. And to the extent that the jury finds that the information reported was inaccurate and, for example, that this defendant says verified as reported for 99 percent of the disputes that come in, we want to argue it's quicker to click that verified as reported button than it is to actually go back behind the scenes and do an investigation to find out if the information was accurate or not.

THE COURT: But if they click the button and it was the right click, then they did nothing wrong.

MR. ERAUSQUIN: Correct. But if the jury, if we get to that point, we're not going to know when we're at trial whether or not the jury is going to rule that way. We want to have the evidence in hand to argue for willfulness.

So, the jury is going to have to determine both there was a violation and it was willful.

THE COURT: Is there a procedure by which the bank verifies something and then later on that determination is determined to be accurate or not accurate?

MR. ERAUSQUIN: The bank as part of its determination to whether to verify it has to determine whether or not it's accurate or not accurate. It has to do the quote/unquote reasonable investigation that Johnson requires.

THE COURT: I mean subsequent to making the statement verified as reported.

MR. ERAUSQUIN: That's it, that's the-- I'm sorry.

THE COURT: Is there any quality assurance that they say later on that say, well, you verified those hundred as accurate, and based on our audit or quality assurance process, we've determined that 60 of those verified as accurate were wrong?

MR. ERAUSQUIN: Correct. That may be part of its internal audit procedures, but from the consumer standpoint as soon as that verified as reported button is clicked, that information is staying in your credit report. There is no, we're going to come back 30 days after the fact and revisit it. That's the end of the investigation as far as the consumer is concerned.

THE COURT: I understand that. But there are certain elements, four elements that you have to prove to prove that they violated the FCRA. The fact that they click on a button isn't one of those. The fact that they click on the button and that was the wrong click and they didn't do a reasonable investigation to determine prior to clicking on the button that

it would be the right click, that would be relevant information.

MR. ERAUSQUIN: Yes, sir.

THE COURT: The fact that they clicked the button doesn't help anyone.

MR. ERAUSQUIN: Yes, sir. But this goes to the previous topic we were talking about, the amount of disputes that they process in a day. Our depositions that we have taken in other cases, for example, these employees will take 20 seconds per dispute and just go through and just say, the information on this screen matches the information on this screen, I am going to click verified as reported, and they fly through them.

The reason that we're asking for this information is so we can argue to the jury, in a given month you processed 50,000 of these disputes, and in every single one of them you just clicked the verified as reported button. You are not doing a reasonable investigation. In fact, you're not doing any investigation, you're just clicking a button.

THE COURT: All right. Well, I'm sure their response will be, no, we conducted an investigation before we clicked the button, but if that's your argument-- Mr. Kostel.

MR. KOSTEL: Yes, Your Honor, real quick on that last one, start with the last one.

They are already taking the depositions of the

operators. These might be appropriate topics for the operators. If they need to take a corporate deposition on that, we can revisit it if they don't get the information they want from the operators.

THE COURT: That appears to be reasonable.

MR. KOSTEL: And, Your Honor, at the risk of backtracking a little bit here, I just want to address two subjects that you just ruled on, number 25, the Bach v. First Union FCRA case. My concern there is our answer may be, we got information from our lawyer. Well, what's the information you got from your lawyer? I don't want to set this up for some kind of privilege argument when our in-house counsel tell them about the case.

THE COURT: Well, they can't get information from what the lawyer says.

MR. KOSTEL: But I need to educate them on this subject, which is framed in terms of legal advice from counsel. What did your counsel tell you about the Bach v. First Union case. That's my concern with the topics that say, tell us about this case.

They have already covered all of our policies, all of our manuals. The question should be, under your-- We designate a deponent on the policy--

THE COURT: Well, let's make this simple--

MR. KOSTEL: Did your policy change as a result of

the Bach v. First Union case, that would be a very simple question.

THE COURT: Counsel, let's make this simple. We will change 25 to your personal knowledge. Then we will avoid the attorney/client privilege problem. If they don't have any personal knowledge, then that will be the answer to the question.

MR. KOSTEL: That's fine, as long as I don't have to educate them, which I would have to do ordinarily under a 30(b)(6) topic.

THE COURT: But that's not--

MR. KOSTEL: Usually lack of knowledge--

THE COURT: Usually that wouldn't be personal knowledge. What you educate them on is not their personal knowledge.

MR. KOSTEL: Understood, understood. And then, Your Honor, number 17. I mean, it's so overbroad. I think it needs some attention because it also duplicates number 14.

Everything that was done regarding the plaintiff's disputes made pursuant to the FCRA, including all dates of communications or actions, all documents considered, all persons involved, the location of all such actions, all steps taken, you get the idea. We're already talking about every dealing we had with the plaintiff in number 14. I didn't object to that.

But this notion that one person or, you know, we have got to get all knowledge from the bank on all subjects and all locations and all times, that's onerous, to prepare a deponent on all those things, when it is already subsumed in number 14.

Thank you.

MR. ERAUSQUIN: As to the privilege issue, Judge, we are, of course, not intending to convey privilege, but they can't have it both ways. They can't defend the willfulness claim by saying, well, we investigated these based on procedures and advice that we got from lawyers, but we're not going to tell you what that advice was or why we chose these policies to put in place.

THE COURT: You cannot get around the attorney/client privilege.

MR. ERAUSQUIN: Yes, sir. Yes, sir.

THE COURT: It's a recognized privilege in the federal system.

MR. ERAUSQUIN: Absolutely. And that's why we rely heavily on the use of Rule 37(c)(1). They are not going to be permitted to use at trial information that they don't give us during discovery.

So, this actually ties back to 17, which he was just discussing. This goes directly to what was done with regard to these investigations. If they don't want to tell us about it, that's in my fine, but we're going to move later to preclude

the use of that evidence in their defense.

THE COURT: You have an absolute right to use the Federal Rules of Civil Procedure as the way you interpret them.

MR. ERAUSQUIN: Yes, sir. But I just want to be clear so we don't get into a discovery dispute and have to call chambers, 17 relates directly to what was done with regard to investigating these disputes for these consumers. It says, everything--

THE COURT: I think his problem is you say all.

MR. ERAUSQUIN: Yes, sir. We want to know--

THE COURT: Like if someone, like if a mail carrier put the, took the dispute information, someone put it in an envelope and he went to the mail box and dropped it off, that would be, that would be part of 17.

MR. ERAUSQUIN: Yes, sir.

THE COURT: Well, that is a little overbroad. Every little thing that happened in regards to this dispute is not really relevant. Whether or not, whether or not a mailman picked up a dispute in an envelope out of a mail box, it's not relevant.

MR. ERAUSQUIN: Correct. I think we are kind of tilting at windmills here, Judge. If they don't want to tell us about the mailman, we're not going to push it, but they can't use that at trial, is the point.

THE COURT: We understand that.

MR. ERAUSQUIN: Yes, sir. Okay.

THE COURT: I am sure counsel completely understands the Federal Rules of Civil Procedure.

MR. ERAUSQUIN: Yes, sir. Thank you, Judge.

MR. KOSTEL: Thank you very much, Your Honor. That's all we have.

Should we review the topics that you are eliminating one more time for the record?

THE COURT: All right. That was topic 1. Of course, we modified topic 2. I believe topic 5. Topic 13.

MR. KOSTEL: 16, Your Honor.

THE COURT: 16. I believe that was it.

MR. KOSTEL: And 17 as limited, or as discussed, I guess.

THE COURT: Correct.

MR. KOSTEL: Thank you, Your Honor.

THE COURT: All right. Now, the plaintiff's motion for leave to supplement their amended complaint.

MS. KELLY: We don't have a motion--

MR. KOSTEL: I think we just save some time, Your Honor.

THE COURT: Oh. No, that's in the wrong file. Thank you.

MR. KELLY: Okay.

THE COURT: That concludes this matter, correct?

MR. KOSTEL: Correct, Your Honor.

MS. KELLY: Thank you, Judge.

MR. KOSTEL: Thank you.

MR. ERAUSQUIN: Thank you. Have a good day, Your Honor.

C E R T I F I C A T E of T R A N S C R I P T I O N

I hereby certify that the foregoing is a true and accurate transcript that was typed by me from the recording provided by the court. Any errors or omissions are due to the inability of the undersigned to hear or understand said recording.

Further, that I am neither counsel for, related to, nor employed by any of the parties to the above-styled action, and that I am not financially or otherwise interested in the outcome of the above-styled action.

/s/ Norman B. Linnell

Norman B. Linnell

Court Reporter - USDC/EDVA